U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

HENRY IMMANUEL, **ARB CASE NO. 96-022**

COMPLAINANT, **ALJ CASE NO. 95-WPC-3**

v. **DATE: May 28, 1997**

WYOMING CONCRETE INDUSTRIES, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD[1/]

FINAL DECISION AND ORDER OF DISMISSAL

On October 24, 1995, the Administrative Law Judge (ALJ) issued a Recommended Decision and Order (R. D. and O.) under the employee protection provisions of the Water Pollution Control Act (WPCA), 33 U.S.C. § 1367 (1988), and implementing regulations at 29 C.F.R. Part 24 (1993). It concluded that the complaint should be dismissed because it was untimely and lacked merit. R. D. and O. at 7, 8, 10. Upon a full review of the record,[2/] the Board holds the complaint timely but lacking in merit because the complainant, Henry Immanuel, was not terminated for his protected WPCA activities but for legitimate business reasons relating to his job performance.

BACKGROUND

Henry Immanuel began his probationary employment as a ready-mix concrete truck driver at the Blades, Delaware plant of Wyoming Concrete Industries, Inc. (Wyoming) effective, June 14,

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[1/] On April 17, 1996, a Secretary's Order was signed delegating jurisdiction to issue final agency decisions under the statute and regulations involved in this case to the newly created Administrative Review Board. 61 Fed. Reg. 19978 (May 3, 1996). Secretary's Order 2-96 contains a comprehensive list of the statutes, executive order, and regulations under which the Administrative Review Board now issues final agency decisions. Final procedural revisions to the regulations implementing this reorganization were also promulgated on that date. 61 Fed. Reg. 19982.

[2/] This includes the full briefs of the parties to the Board. We grant their motions to exceed the page limits of the Nov. 1, 1995 briefing order because of the complexities of the case.

1993, after completing an application describing his employment history and passing driving and medical examinations. Wyoming, a concrete business based in Wyoming, Delaware, maintained several plant locations in southern Delaware and adjoining Maryland counties on the lower Eastern Shore. His probationary employment was terminated on July 30, 1993, ostensibly for business-related reasons, including: (1) three separate customer complaints; (2) falsification of material information on his employment history with all three employers listed in his application (including the only ready-mix driver position specified); (3) an unsatisfactory probation performance evaluation; (4) his unwillingness or physical inability to work a full working day; (5) safety, business, and legal concerns arising from Wyoming's inability to verify his previous employment as required under the Federal Motor Carrier Safety Regulations at 49 C.F.R. § 391.23(c); and (6) his failure to maintain vehicle inspection forms in his truck as required by 49 C.F.R. § 396.11. *See* Respondent's post-hearing brief at 3-4.

Immanuel asserts that his discharge was predicated upon various protected activities under the WPCA: (1) his July 25, 1993 distribution of leaflets at a company picnic, containing various grievances, including environmental concerns:

> #1 Environmental Problems- oil in drums exposed to rain has spilled onto the ground; the cement acid that is used on trucks to clean them goes directly onto the ground (does anybody believe that this stuff works?) What would the EPA say about this pollution?

JX 3;[3/] and (2) similar environmental concerns raised earlier with Frank Fluharty, his supervisor and manager of the Blades, Delaware facility, and Larry Hobbs, manager of the Salisbury, Maryland facility, involving acid and cement residues washed on the ground, oil leaks from vehicles, and oil spills from drums.[4/] *See* Complainant's initial brief to the Board at 21-33.

[3/] The leaflet concludes as follows:

> We have some options. We should all work together, so as to help the company profit so as to help us to profit- how about a % of the profit for us?
>
> Our basic option is - we should unionize! I recommend The Teamsters Union - Local 355 (Salisbury Office).
>
> I hope that this is not taken as an insult. But, I believe that we, as employees, should be able to enjoy our job and to benefit by having decent trucks, health benefits and a good wage. Contact me and if you want a change!

JX 3.

[4/] The ALJ mentioned but did not address this assertion of a statutorily protected internal complaint to Fluharty (but not Hobbs) as a basis of his discharge. R.D. and O. at 2. The ALJ focused on Immanuel's distribution of the leaflets. R.D. and O. at 2, 4, 7-10. Immanuel requests (continued...)

DISCUSSION

A. Timeliness of the Complaint

Regardless of the merits of Immanuel's claim, it is subject to dismissal if he did not file his complaint with the Secretary of Labor "within thirty days after such alleged violation occurs," 33 U.S.C. § 1366, unless the filing period can be extended on the basis of equitable tolling. *Rose v. Dole*, 945 F.2d 1331, 1334-36 (6th Cir. 1991); *School District of the City of Allentown v. Marshall*, 657 F.2d 16, 18-21 (3rd Cir. 1981); *Prybys v. Seminole Tribe of Florida*, ARB Case No. 96-064, ALJ Case No. 95-CAA-15, ARB Dec. and Ord., Nov. 27, 1996, slip op. at 3-9; *Roberts v. TVA*, Case No. 94-ERA-15, Sec. Fin. Dec. and Ord., Aug. 18, 1995, slip op. at 4-7; and cases cited.

Under *Allentown*, 657 F.2d at 19-20, equitable tolling is appropriate if a complainant has mistakenly filed the "precise statutory claim in issue" in the wrong forum, but within the filing period. Although Immanuel's complaint to the Wage and Hour Division of the U.S. Department of Labor (the proper complaint forum under 29 C.F.R. § 24.3) was filed on September 16, 1994, more than a year after his termination on July 30, 1993, he did file a number of complaints with other agencies lacking jurisdiction to investigate and resolve his whistleblower complaint within the thirty-day statutory complaint-filing period. However, the ALJ concluded that these complaints did not toll the limitations period under *Allentown* and the regulations. The ALJ found that:

> Withing a week of his discharge, Complainant sought help from the Environmental Protection Agency, and was advised to contact the Occupational Safety and Health Administration (OSHA), the National Labor Relations Board (NLRB), and the Delaware's [sic] Division of Natural Resources and Environmental Control (DNREC). Tr. at 104, 107. Accordingly, Complainant addressed a letter dated August 4,1993 to DNREC; filed a complaint with NLRB on August

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[4/](...continued)
that we supplement the ALJ's findings on protected activity by holding that Immanuel reported his concerns about acid and cement residue from truck washings and oil leaks and spills to Fluharty and Hobbs and that these complaints were the basis of his discharge, even if the intention to fire him was made prior to his distribution of the leaflets at the company picnic. *See* Complainant's initial brief to the Board at 3, 16, 21-23, 32-33; Complainant's reply brief to the Board at 9, n.6. Contrary to Respondent's answering brief in opposition to Complainant's appeal at 24-25, we hold that Immanuel raised this argument before the ALJ with respect to Fluharty and Hobbs. Complainant's post-hearing brief at 4, 25-26, referring to Fluharty, and T. 78, concerning Hobbs. *See Exeter Bank Corporation, Inc. v. Kemper Securities Group, Inc.*, 58 F.3d 1306, 1318 (8th Cir. 1995); *Rose v. Dole*, 945 F.2d 1331, 1335-36 (6th Cir. 1991) (argument waived on appeal if not raised below). Although reference to Hobbs is limited to the transcript, its omission from the brief to the ALJ does not amount to a waiver of Immanuel's argument as applied to Hobbs. *See Rose v. Dole*, 945 F.2d at 1334 ("[i]t appears the ALJ did hear testimony on the requirement . . . . Thus, even though this argument was not forcefully raised below, we think it was sufficiently raised to preserve it for review."). Accordingly, we shall address these incidents involving Fluharty and Hobbs.

> 12, 1993; and filed a complaint with OSHA, by telephone on August 27, 1993. JX 6; RX 1; CX 2. One year later, by letter dated September 16, 1994, Complainant filed with the Wage and Hour Division, Department of Labor the complaint which initiated the instant proceeding. JX 4.
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> * * * * *
>
> In sum, within 30 days of his discharge Complainant contacted several agencies and gave them an account of what had happened. But these stories are not complaints raising the "precise statutory claim" that section 507 of WPCA had been violated, even though a lawyer may see in them the basis for filing a complaint.

R. D. and O. at 4-5, 6.

We disagree with the ALJ that Immanuel's August 4, 1993 letter to Delaware's Division of Natural Resources and Environmental Control (DNREC) does not "raise the precise statutory claim in issue" under *Allentown.* The letter indicates that he believed that he was fired for raising environment concerns and requested help:

> I am enclosing a copy of the letter I distributed on 7-25-93 (Sunday), later that week 7-30-93 (Friday) I was terminated from job [sic].
>
> #1 listed in the letter pertains to certain environmental problems relating to the Blades Plant.
>
> But a major one at all the plants would be of drum cleanout after cement delivery.
>
> Any Question Please Call [sic]
>
> Thanks [sic]
>
> Henry Immanuel

JX 6. This letter connects his termination with whistleblowing activity. It is not rendered defective as a complaint because it "does not allege a violation of the employee protection provisions of any statute, state or federal, and does not seek any relief." R. D. and O. at 5. 29 C.F.R. § 24.3(c) recognizes that some complainants, including Immanuel, file their complaints without the assistance of legal counsel and therefore should be accorded broad latitude in framing the contents of their complaints. *See Bonanno v. Northeast Nuclear Energy Co. and C.N. Flagg Power, Inc.*, Case Nos. 92-ERA-40, 92-ERA-41, Sec. Fin. Dec. and Ord., Aug. 25, 1993, slip op. at 8. The concluding

statement in Immanuel's letter, "Any Question Please Call," indicates that he wished to further explain and elaborate upon the nature of his complaint (his address and phone number were listed in the letter). When he received no response from DNREC, he made follow-up calls to that agency, "continuously call[ing] Ms. Carol Brown, my first contact, to find out what's been going on with my transmission of the letter," T. 110, but never received a response from that agency.[5/] Thus, we conclude that this letter constitutes a whistleblower complaint, rather than "the appearance of a citizen's report of a possible law violation," R. D. and O. at 6.

The ALJ believed that tolling was also inappropriate because Wyoming had not received notice of the filing of Immanuel's DNREC complaint within the thirty-day complaint-limitations period. The ALJ stated:

> Respondent was entitled to notice within 30 days from July 30, 1993, that it had been charged with violating section 507 of the WPCA. The regulations may be read as relieving Complainant of the statutory duty to notify the person charged with discrimination, and as devolving upon the Administrator of the Wage and Hour Division the duty to do so "upon receipt" of a timely complaint. 29 C.F.R. § 24.4(a). Respondent in this case did not receive a timely notice either way. Part of the rationale for tolling a limitations period when a claim has been filed in the wrong forum is that the respondent has been put on notice within the appropriate limitations period. *School Dist. of City of Allentown v. Marshall*, 657 F.2d 16, 20 (3rd Cir. 1981).

R. D. and O. at 6-7. The ALJ's reliance on *Allentown* is misplaced because the decision does not address when a respondent must receive notice of a complaint filed with the wrong agency ("forum") for equitable tolling to apply. Rather, the decision discusses the limitations period for filing a complaint with the wrong agency: "[T]he filing of a claim in the wrong forum must also be timely before it will toll the appropriate limitations period." 657 F.2d at 20. The statute itself does not specify that a respondent must be notified within the thirty-day complaint-filing period. It simply states: "A copy of the application shall be sent to such person who shall be the respondent." 33 U.S.C. § 1367(b). Similarly, the regulations are also silent on this point. 29 C.F.R. § 24.3 (complaints) does not refer to notifications to respondents of complaint filings. § 24.4(a)

[5/] Respondent's answering brief in opposition to complainant's appeal at 7 states that Immanuel offered no proof that the letter was actually mailed or received. However, he testified that he had mailed the letter, T. 109, 149-50, and that DNREC did not respond. Such an explanation is persuasive when considering that it is a reasonable presumption that mail may occasionally be lost or misdelivered, distributed to the wrong office or section of a governmental agency, lost within the agency, or otherwise misplaced, forgotten or unprocessed. *See* 29 C.F.R. § 18.301 (presumptions in hearings before the Office of Administrative Law Judges, U.S. Dept. of Labor); *U.S. v. Perry*, 496 F.2d 429, 430 (10th Cir. 1974); *U.S. v. Seligson*, 377 F.Supp. 638, 641 n.6 (S.D.N.Y. 1974). Accordingly, the ALJ was correct in considering whether this document constituted a complaint under the WPCA.

(investigations) simply states: "Upon receipt of a complaint . . . , the Administrator shall notify the person named in the complaint, and the appropriate office of the Federal agency charged with the administration of the affected program of its filing"; no time limitations are specified for notification to the named respondent. The ALJ's interpretation creates a condition impossible of fulfillment when an agency, such as DNREC, does not respond to a complaint wrongly filed with it. Thus, we conclude that Immanuel's DNREC letter tolled the limitations period under *Allentown's* criteria for equitable tolling because he filed the claim withing thirty days of the alleged violation, even though it was filed in the wrong forum.

We agree with the ALJ, however, that Immanuel's August 27, 1993 OSHA complaint, CX 2, did not meet the *Allentown* standard. R. D. and O. at 6. The telephone complaint, taken by OSHA Investigator Ronald F. Tate, is unclear as to the nature of Immanuel's discrimination charge. An April 28, 1995 file memorandum by OSHA Investigator William D. Sequin states that Immanuel was asked during a September 28, 1993 interview with Tate and himself "why he felt Respondent terminated him and he advised it was due to his attempts to unionize their work place." RX 6 at 1. *See also* Tate's April 28, 1995 memorandum for Edward J. Monahan, OSHA Regional Supervisory Investigator, RX 6 at 2-3.[6/]

B. Protected Activities

We agree with the ALJ that Immanuel's distribution of the leaflet at the company picnic was an internal complaint protected by the WPCA. *See Bechtel Construction Co. v. Secretary of Labor*, 50 F.3d 926, 931-33 (11th Cir. 1995) and cases cited; *Passaic Valley Sewerage Commissioners v. U.S. Dept. of Labor*, 992 F.2d 474, 478-80 (3rd Cir. 1993) and cases cited, *cert. denied*, 510 U.S. 964 (1993); *Stockdill v. Catalytic Industrial Maintenance Co., Inc.*, Case No. 90-ERA-43, Sec. Fin. Dec. and Ord., Jan. 24, 1996, slip op. at 5 and cases cited; R.D. and O. at 5. We disagree with Wyoming's argument that the dissemination of this leaflet and its receipt by Wyoming's president William DiMondi at the picnic was not protected activity. Wyoming argues that "Immanuel created and distributed the leaflet in an attempt to fabricate a claim for retaliatory discharge (under any conceivable statute applicable including the [WPCA]) when he already knew that he was about to be terminated for his poor work performance and customer complaints (among other things)." Respondent's answering brief in opposition to complainant's appeal at 22-23. A complainant's environmental claim, even if ultimately shown to be unfounded, is protected activity if it is grounded in conditions constituting reasonably perceived violations of the environmental statute. *Keene v. Ebasco Constructors, Inc.*, ARB Case No. 96-004, ALJ Case No. 95-ERA-4, ARB Dec. and Ord. of Rem., Feb. 19, 1997, slip op. at 8; *Carson v. Tyler Pipe Co.*, Case No. 93-WPC-11, Sec. Fin. Dec. and Ord., Mar. 24, 1995, slip op. at 8; *Minard v. Nerco DeLamar Co.*, Case No. 92-SWD-1, Sec. Dec. and Rem. Ord., Jan. 25, 1995, slip op. at 7-9, 24; R.D. and O. at 7-8. This protection is not removed because a complainant may have had other motives for engaging in the protected activity. *Diaz-Robainas v. Florida Power & Light Co.*, Case No. 92-ERA-10, Sec. Dec. and Rem. Ord., Jan. 19, 1996, slip op. at 15; *Oliver v. Hydro-Vac Services, Inc.*, Case No. 91-SWD-00001, Sec. Dec. and Ord. of Rem., Nov. 1, 1995, slip op. at 13-14. The purpose of the whistleblower statutes is to

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[6/] Immanuel's NLRB complaint, R. D. and O. at 4, was not an issue before the ALJ. *See* complainant's post-hearing brief at 21-22.

encourage employees to come forward with complaints so that remedial action may be taken. "If such a course of action also furthers an employee[']s own selfish agenda, so be it." *Carter v. Electrical District No. 2 of Pinal County*, Case No. 92-TSC-11, Sec. Dec. and Ord. of Rem., Jul. 26, 1995, slip op. at 19. Thus, it is irrelevant whether Immanuel may have told William DiMondi at the picnic, "Now that I have distributed this leaflet, you cannot fire me," T. 382, in an attempt to save his job from a termination he may have believed imminent. *See* R. D. and O. at 3.

Immanuel's late June, 1993 discussions, T. 67-80, with his supervisor Frank Fluharty, manager of the Blades, Delaware facility, and with Larry Hobbs, manager of the Salisbury, Maryland facility shortly thereafter, involving acid and cement residues from truck washings and oil leaks and spills, were clearly internal complaints protected under the WPCA. Further, we do not question Immanuel's assertion that such complaints were made, since Wyoming could have called Fluharty and Hobbs to rebut this assertion. *See* internal complaint decisions cited in preceding paragraph. Since these complaints and their relevance to Immanuel's discharge were raised before the ALJ (but not addressed in his decision), they are properly before us for consideration. *See* n.4 and surrounding text.

C. Lawfulness of the Discharge

The ALJ found that Immanuel failed to demonstrate by a preponderance of the evidence that his discharge was predicated on his distribution of the leaflet because the decision to fire him was made prior to its distribution. Rather, the ALJ concluded that Immanuel was terminated for legitimate, work-related reasons, primarily customer complaints (and also Immanuel's inability to sometimes work a full shift), as follows:

> . . . Respondent has adduced ample evidence that Complainant's employment was terminated for legitimate business reasons, primarily on account of customer complaints with regard to his work performance and conduct. The decision to terminate Complainant was made by Mr. DiMondi about ten days before the picnic, and was announced to Respondent's managers at a supervisors' meeting held on July 21, 1993, as shown by the minutes of that meeting. Tr. at 355, 357, 361-62; RX 18. The incidents that gave rise to the complaints are well documented.
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> * * * * *
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> In sum, I find that Respondent discharged Complainant for legitimate reasons. The customers' complaints discussed above provided a sufficient reason for terminating a new employee during his probationary period. Moreover, the fact that the decision was made before the disclosure of Complainant's environmental concerns at the picnic precludes a finding that the decision was in retaliation for that disclosure. This conclusion makes it unnecessary to discuss the discrepancies that Mr. DiMondi discovered in investigating

> Complainant's employment history, which provided additional reasons for the discharge.

R. D. and O. at 8-10.

We conclude that Immanuel has not shown by a preponderance of the evidence that the decision to fire him was made subsequent to his distribution of the leaflet. William DiMondi testified that he was involved in a conversation with Frank Fluharty on or about July 15, 1993 about terminating Immanuel, T. 353-56. The July 22, 1993 memorandum, reflecting the minutes of the July 21, 1993 ready-mix supervisors' meeting, stated: "Everybody should know that Frank [Fluharty] has 2 new drivers hired in the last 30 days (Lonnie Wallace and Henry Immanuel). Frank indicated the he had made the decision to bring Lonnie on permanent full-time however [sic] he will be terminating Henry Immanuel's employment within the next week or two due to customer complaints. Any applications submitted to Longpoint or to Salisbury from any downstate resident drivers should be forwarded to Frank for his consideration." RX 18 at 2-3.[7/]

Further indication that Wyoming decided to terminate Immanuel prior to the company picnic was its placement of an advertisement for a ready-mix driver in the Delaware State News, commencing July 24, 1993 (one day before the picnic) through July 30, 1993. RX 19 (classified invoice). William DiMondi testified that this advertisement was intended to obtain Immanuel's replacement. T. 368. As DiMondi explained, Immanuel was not fired as soon as the termination decision was made because "[w]e were very busy at the time. And for the convenience of the company, we wanted to try to find a replacement while Mr. Immanuel was restricted with whom he could work and would not cause us any further exposure of potential liability." T.367. After reporting Immanuel's imminent termination "within the next week or two due to customer

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[7/] The July 22 memorandum from Francis A. DiMondi, Jr., Wyoming's vice-president (from minutes routinely prepared by William DiMondi), was addressed to those listed in attendance at the 6:00 p.m. meeting the previous day, including Frank Fluharty, Larry Hobbs and William DiMondi. RX 18 at 1. Complainant's initial brief to the Board at 28-29 suggests that this document may have been altered or fabricated because the statement, "he will be terminating Henry Immanuel's employment withing the next week or two due to customer complaints," contains only the word "employment" on the last line of p. 2 with the remainder of the sentence appearing on p. 3. The document is prepared with full justification, like the format of this page, so the fact that only one word appears on the last line of page 2 does raise some suspicion. However, raising a suspicion is a far cry from carrying a burden of proof by a preponderance of the evidence. The original document was not offered into evidence. Moreover, Immanuel's counsel did not object to the admittance of the copy presented. *See* T. 356-58, 473-75, 576-78. Accordingly, this matter is waived on appeal to the Board. *See* n.4 and cases cited. Although Hobbs, according to Immanuel's testimony, T. 535-36, told Immanuel that he was not at the meeting and did not recall receiving a copy of this memorandum, William DiMondi testified emphatically that Hobbs attended the meeting, T. 475. In any event, Hobbs' attendance is irrelevant to the substance of the meeting minutes. These minutes were maintained in the regular course of business, and Wyoming introduced similar minutes involving adverse personnel actions immediately preceding its decision to fire Immanuel. *See* RX 20, Jun. 18, 1993, at 1 (terminations of Bucky Shelton and Preston Northam).

complaints," the July 22, 1993 memorandum of the supervisors' meeting states, "Any application submitted to Longpoint or to Salisbury from any downstate resident drivers should be forwarded to Frank [Fluharty] for his consideration." RX 18 at 3. This memorandum statement supports the view that the advertisement in the Delaware State News was an additional means for obtaining applications for Immanuel's job. Although there is evidence in the record that Wyoming was preparing to hire additional drivers and thus the advertisement could have been placed to fill these positions, as opposed to Immanuel's, the preponderance of the evidence supports Wyoming's assertion that the advertisement was placed for the purpose of filling Immanuel's position.[8/]

Immanuel argues that William DiMondi could not have made the decision to fire him around July 15, 1993 because DiMondi needed someone to assist him in identifying Immanuel ten days later at the company picnic. Complainant's initial brief at 28. This is incorrect. DiMondi testified that although he had not "formally met" Immanuel prior to the picnic, he had "observed" him pour concrete at the "Dupont pours" project in mid-July, 1993. T. 261-62. DiMondi never testified that he needed or requested others to identify Immanuel as the leaflets' author. DiMondi's testimony merely indicates that various employees pointed Immanuel out to him in the course of DiMondi's social rounds because Immanuel's leafleting had become a major topic of conversation. T. 455-58. *See* T. 486-87 (testimony of employee Gregory Cole). In any event, DiMondi's ability to identify Immanuel by sight on July 25 has no bearing on his prior decision to terminate Immanuel, which he made as president of the company in consultation with Frank Fluharty. T. 353-56.

Similarly, Immanuel argues that Wyoming did not decide to fire him prior to the picnic because William DiMondi did not investigate customer complaints against Immanuel prior to the picnic. Complainant's initial brief at 30-31. However, DiMondi testified that the decision to seek formal verification and documentation of the basis for Immanuel's termination was made because he expected litigation after the picnic incident.[9/] As DiMondi explained at the hearing:

> . . . After things came to a head with the distribution of the leaflet, I took it upon my own -- while I was aware of these complaints because they were relayed to me by Mr. Flueharty [sic] in our discussion regarding Mr. Immanuel's employment, I wanted to make sure after having raised these issues in the leaflet that -- of my

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[8/] The record does not contain any information regarding the date on which Immanuel's replacement commenced work. Since Immanuel was kept on, despite his perceived inadequacies as an employee, because of Wyoming's busy schedule, we would expect that his replacement would have begun working very soon after Immanuel's termination became effective. However, since that information is not contained in the record, we cannot draw an inference one way (that the replacement started right after Immanuel's termination, which supports Wyoming's claim) or the other (that a gap occurred between the effective date of Immanuel's termination and the start date of his replacement such that doubt is cast upon Wyoming's stated reason for keeping Immanuel on for two weeks after the decision to discharge him was made).

[9/] DiMondi testified that Immanuel told him at the picnic, "Now that I have distributed this leaflet, you cannot fire me." T. 382.

> own inquiry that I was satisfied that the justification was there and that in fact the customers felt as Mr. Flueharty [sic] had represented them to me regarding his demeanor and the way he acted on these jobs. So, I contacted in response to that during the week of July 26, 1993, and prior to Mr. Immanuel's termination, I spoke with the two complainants that I had mentioned.
>
> * * * * *
>
> Q. Okay, and as a result of those contacts, what did you decide to do with regard to Mr. Immanuel's employment?
>
> A. I prepared the letters of complaint. There are two in particular that were typewritten in my office and that were later signed at my request by those two complainants as a result of my telephone discussion with them.
>
> Q. Now, why did you find it necessary to go through all of this in connection with Mr. Immanuel's termination?
>
> A. After what happened on Sunday, quite frankly, I expected litigation. I consulted with counsel, and I wanted to make sure that I had properly documented every bit of information that I felt rose to justify the necessity for terminating his employment with Wyoming Concrete.
>
> Q. The -- when you refer to Sunday, you're referring to July 25. Is that correct?
>
> A. Sunday, July 25, the company picnic in 1993.

T. 363-65. We find DiMondi's stated reasons for seeking proof of Immanuel's unsatisfactory work record only after the picnic incident to be reasonable. In sum, we conclude that Immanuel has not shown by a preponderance of the evidence that the decision to fire him was made subsequent to his protected activity in distributing the leaflets on July 25, 1993. Therefore, we cannot find that the leafletting was a cause of Immanuel's subsequent termination.

The remaining question is whether the decision on or about July 15, 1993 to terminate Immanuel was made because of his prior internal complaints to Fluharty and Hobbs, T. 67-80, involving acid and cement residues and oil leaks and spills. *See* n.4 and surrounding text, and Section B, *supra*. We conclude that Immanuel has not shown by a preponderance of the evidence that these events played a part in the decision to terminate him. *Erb v. Schofield Management, Inc.*, ARB No. 96-056, ALJ Case No. 95-CAA-14, ARB Fin. Dec. and Ord., Sept. 12, 1996, slip op. at 2-3 and cases cited. Rather, the evidence presented shows that the termination decision was based solely on his poor work performance, primarily reflected in customer complaints. These customer

complaints regarding the proper placement of concrete involved: (1) the "Mahetta" job, July 7, 1993, R. D. and O. at 9, T. 426-27, 430, 441, 503-04, 522-24, 540; and (2) the "Adkiss" job, July 13, 1993, R.D. and O. at 9, T. 492-97, 504-08, 526-28, 548-50. *See* RX 8 (Wyoming Probationary Employee Performance Evaluation/Status Determination). Indeed, by the time of his discharge, Immanuel was the subject of a third customer complaint, the "O'Neal" job, July 22, 1993, R. D. and O. at 9, T. 303-04, 435-36. Immanuel, himself, acknowledged that customers and supervisor Fluharty were unhappy with his poor job performance. T. 522-24, 540-44, 548-50; RX 2 at 10-15 (Immanuel's affidavit to the NLRB).[10/]

Immanuel did not encounter disparate treatment in his job loss. During 1993, Wyoming terminated three employees during their probationary term, including Immanuel. RX 22, 23; T. 375, 378. During the two years immediately preceding Immanuel's termination, Wyoming terminated three employees due to customer complaints. T. 378-79. *See Skelley v. Consolidated Freightways Corp.*, Case No. 95-SWD-001, ARB Fin. Dec. and Ord. of Dism., July 25, 1996, slip op. at 5 (absence of disparate treatment considered in evaluating lawfulness of discharge).

In reaching our conclusion, we have considered Immanuel's argument that Wyoming's refusal to call various witnesses at trial requires application of an inference that their testimony would have been adverse to Wyoming. Complainant's initial brief at 33-34; Complainant's reply brief at 11. We have, in fact, drawn such an inference regarding whether Immanuel engaged in protected activity prior to the picnic incident. *See* discussion *supra* at 7. In any event, Wyoming's failure to call various personnel to testify does not mean that the ALJ was obligated to resolve all issues with respect to which they might have testified against Wyoming. "The rule permits an adverse inference to be drawn; it does not create a conclusive presumption against the party failing to call the witness." *Rockingham Machine-Lunex Co. v. NLRB*, 665 F.2d 303, 305 (8th Cir. 1981). *See* R. D. and O. at 9.

Immanuel also argues that if we do not rule in his favor on the merits, we should remand this case to the ALJ with instructions to issue subpoenas for relevant witnesses and evidence that he can use to further support his claim. Complainant's initial brief at 34-35; Complainant's reply brief at 11-12. We decline to do so. As indicated in the ALJ's March 3, 1995 Order Denying Application for Subpoenas (citing *Malpass v. General Electric Co.*, Case Nos. 85- ERA-38, 85-ERA-39, Sec. Fin. Dec. and Ord., Mar. 1, 1994), the WPCA does not authorize the issuance of subpoenas in whistleblower proceedings. Immanuel's constitutional argument for this request cannot be considered because it is not within the Board's jurisdiction. Secretary's Order 2-96, § 4 (delegation of authority and assignment of responsibility), 61 Fed. Reg. 19978-79. *See* n.1.

[10/] We do not conclude that Immanuel's insistence on resting when he was "fried" was shown on this record to be an appropriate basis for Wyoming's termination decision. The Surface Transportation Assistance Act, 49 U.S.C.A. § 31105 (1994), protects covered employees who refuse to drive when fatigued. Immanuel has made no claim under this statute, but public policy considerations preclude us from using this potentially unlawful basis for Wyoming's termination decision as support for our holding (although we do not decide whether that statute was actually violated in this case).

ORDER

In sum, we hold that Immanuel's complaint is without merit. Immanuel was terminated for job-related reasons primarily involving customer complaints, completely separate from any of his protected activities. Accordingly, this case is DISMISSED.

SO ORDERED.

DAVID A. O'BRIEN
Chair

KARL J. SANDSTROM
Member

JOYCE D. MILLER
Alternate Member